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No. 04-5

Supreme Court, U.S.
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In The
Supreme Court of the United States

THE DOE RUN RESOURCES CORPORATION,
DR ACQUISITION CORPORATION,
and MARVIN KAISER,

Petitioners,

vs.

THE HONORABLE MARGARET M. NEILL,
PRESIDING JUDGE, TWENTY-SECOND JUDICIAL
CIRCUIT, CITY OF ST. LOUIS, MISSOURI,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Missouri

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Due Process Clause of the Fourteenth Amendment to the United States Constitution violated where there is no state created right to a particular venue and where the state court considered Petitioners' post-filing affidavits and determined that they did not overcome Plaintiffs' adequate showing under decisional Missouri law that they had a realistic belief under the law and evidence that a valid claim against the joined defendant existed at the time of filing?

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CITATION OF REPORTS OF OPINIONS ENTERED IN THE CASE

The Opinion of the Missouri Supreme Court is reported at *State ex rel. The Doe Run Resources Corporation, et al. v. Neill*, 128 S.W.3d 502 (Mo. 2004) (en banc). The order of the Missouri Supreme Court overruling Relators' Motion for Rehearing is also reported at 128 S.W.3d 502. The now-vacated opinion of the Court of Appeals for the Eastern District of Missouri ("Missouri Court of Appeals") is reported at *State of Missouri, ex rel. The Doe Run Resources Corp. v. Neill,* No. ED81573, 2003 Mo. App. Lexis 745 (Mo. Ct. App. May 20, 2003).

NO BASIS FOR SUPREME COURT JURISDICTION

Respondents do not concede that this Court has jurisdiction to consider the Petition for a Writ of Certiorari. This case does not involve the validity of any treaty or statute of the United States or the validity of a statute of any State. In the absence of any such claims, 28 U.S.C. § 1257(a) grants this Court authority to review a decision of the Missouri Supreme Court only "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

Petitioners assert that a repealed statute of Missouri establishes a state-created due process right they have been denied. Because the statute has been repealed by a Missouri Supreme Court Rule, and other reasons, there is no state-created due process right. Therefore, Petitioners have no colorable due process claim under the United

States Constitution that would provide the legal predicate for this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty or property without due process of law . . . [.] U.S. CONST., amend, XIV, § 1.

MO. CONST. ART. V, § 5

MO. REV. STAT. § 508.010 (2000)

MO. REV. STAT. § 509.290 (2000)

MO. R. CIV. P. 51.045 (effective until June 1, 2004)

MO. R. CIV. P. 55.27 (2004)

MO. R. CIV. P. 55.31 (1965) (repealed)

The text of these statutes appear in Appendix 1.

REASONS THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I. Introduction.

Petitioners filed a pretensive joinder motion claiming that Plaintiffs' state court petition (complaint) pleaded erroneous facts in order to obtain venue in the City of St.

Louis, Missouri against Marvin Kaiser, the Doe Run Resources Corporation Chief Financial Officer and a resident of the City of St. Louis.[1]

Petitioners asserted their purported due process claim for the first time on Motion for Rehearing in the Missouri Supreme Court. Because Petitioners waited to assert their due process claim until the Motion for Rehearing, Petitioners procedurally waived their due process claim. This Court does not have jurisdiction to consider Petitioners constitutional claims.

Under settled Missouri law, a movant claiming erroneous-fact pretensive joinder cannot prevail unless the movant meets two tests: first, the movant must show that the record, pleadings, and facts presented in support of the motion asserting pretensive joinder establish that there is in fact no cause of action against the joined defendant because the pleadings contain false facts ***and***, second, the movant must show that the information available to plaintiffs at the time the petition was filed would not support a reasonable opinion that a case could be made against the joined defendant. *State ex rel. Malone v. Mummert*, 889 S.W.2d 822, 825 (Mo. 1998) (en banc) (emphasis supplied).

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[1] Petitioners are inaccurate in their Statement of the Case. They claim that Plaintiffs initially filed their claims in 1995. While there was a 1995 action, it was brought by three plaintiffs and was properly dismissed by those plaintiffs under Missouri law. The present action, brought by those and five additional plaintiffs not a part of the 1995 action, pertains to a differently defined class, including subclasses, with a different set of defendants, and is based in part on new facts that came to light since the 1995 suit.

In support of an erroneous-fact pretensive joinder motion, a defendant may submit evidence, including affidavits, showing that the alleged facts are not true and cannot be proved. *Bottger v. Cheek*, 815 S.W.2d 76, 80 (Mo. Ct. App. 1991). The plaintiff may counter with evidence demonstrating that plaintiff had a realistic belief at the time the action was filed that the facts pleaded against the resident defendant were true and capable of proof. *Id.* Both the trial court and the Missouri Supreme Court followed this procedure.

The plaintiff's venue choice prevails unless the plaintiff did not have a "realistic belief that under the law and the evidence a [valid] claim exists." *State ex rel. Shelton v. Mummert*, 879 S.W.2d 525, 527 (Mo. 1994) (en banc) (citation omitted). "The fact this belief is subsequently discovered to be erroneous is irrelevant provided the information available at the time of filing was such as to give rise to a reasonable legal opinion that a submissible case could be made against the resident defendant." *Bottger*, 815 S.W.2d at 80. The party claiming pretensive joinder has the burden of proof and persuasion. *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 902 (Mo. 1996).

The Missouri Supreme Court did not ignore Petitioner's affidavits. The court noted that "[t]o refute plaintiffs' allegations, Relators included the affidavits of Mr. Kaiser and another corporate officer." *State ex rel. The Doe Run Resources Corporation, et al. v. Neill*, 128 S.W.3d 502, 505 (Mo. 2004) (en banc); Pet. App. 6. Instead, the Missouri Supreme Court simply concluded that the information contained in the affidavits was not among the information available to the Plaintiffs at the time the petition was filed and did not defeat Plaintiffs' adequate showing of their realistic belief at the time of filing that a valid claim existed against Mr. Kaiser. *Id.* at 506; Pet. App.

7. Because Petitioners did not meet the *Malone* test to establish erroneous-fact pretensive joinder, the Missouri Supreme Court upheld the trial court's determination that venue was proper. *Id.*

The due process claim asserted in this Court was raised for the first time on Motion for Rehearing before the Missouri Supreme Court. Moreover, Petitioners did not refer to or cite MO. REV. STAT. § 509.290 (2000) at any stage of the state court proceedings. Petitioners, therefore, procedurally waived their opportunity to raise their constitutional claims by failing to assert such claims in a fairly precise and timely manner in the state courts.

Finally, the Missouri statute upon which Petitioners now rely, MO. REV. STAT. § 509.290, was not the law of Missouri at any time relevant to this case. In the absence of a state-created due process right, this Court has not recognized a due process right to have a civil case tried in a particular venue chosen by state law. This case fails to provide a sufficient predicate for this Court to recognize a free standing right to a specific civil venue in the Due Process Clause of the Fourteenth Amendment.

The Petition for a Writ of Certiorari should be denied.

II. Petitioners Procedurally Waived Their Due Process Claim.

Petitioners asserted their due process claim for the first time on Motion for Rehearing before the Missouri Supreme Court. Pet. App. 35, 53 – 55. Petitioners cited no statutory basis for this claim in the state courts.

"[T]he general rule [is] that a constitutional question is urged too late, if put forward for the first time upon a

petition for rehearing." *American Surety Co. v. Baldwin*, 287 U.S. 156, 164 (1932).

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987), and the aggrieved party bears the burden of defeating this assumption, *ibid.*, by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here,' *Webb v. Webb*, 451 U.S. 493, 501 (1981).

Adams v. Robertson, 520 U.S. 83, 86-87 (1997). Petitioners thus bear the burden of demonstrating that they presented the federal constitutional claim with "fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 61, 63 (1928); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n. 9 (1980).

In first raising their due process argument on their Motion for Rehearing, Petitioners there merely stated that *Lichterman v. Crockett*, 331 S.W.2d 607, 608 (Mo. 1960) recognized "a valuable right conferred upon litigants" by Missouri venue laws that, if not honored, denies due process.[2] Pet. App. 54. Petitioners failed to inform the Missouri Supreme Court of their argument that § 509.290 constitutes a state-created due process right.

Petitioners now attempt to excuse their untimely and imprecise assertion of their purported due process claim by arguing that the Missouri Supreme Court's opinion

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[2] As discussed, *infra*, *Lichterman* no longer correctly states Missouri law.

"surprisingly reversed a long-established course of accepting post-petition affidavits," citing *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. at 85, n. 9. Pet. 7.

There can be no credible claim that the Missouri Supreme Court's decision altered Missouri law. Both the trial court and the Missouri Supreme Court followed settled Missouri law. *State ex rel. Malone v. Mummert*, 889 S.W.2d 822 (Mo. 1998) (en banc); *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 902 (Mo. 1996) (en banc); *State ex rel. Shelton v. Mummert*, 879 S.W.2d 525, 527 (Mo. 1994) (en banc); *State ex rel. Coca-Cola v. Gaertner*, 681 S.W.2d 445, 447 (Mo. 1984) (en banc), *overruled on other grounds by State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820 (Mo. 1994); *Bottger v. Cheek*, 815 S.W.2d 76 (Mo. Ct. App. 1991), and *State ex rel. Toastmaster v. Mummert*, 857 S.W.2d 869, 871 (Mo. App. 1993).

Nor is there a valid claim of surprise. Indeed, Petitioners fail to note that they presented the affidavits to the trial court and the trial court reached the same legal conclusion as did the Missouri Supreme Court. The trial court's written order noted the affidavits, noted their contents, applied the settled law and concluded: "[T]he Court finds that the information available to Plaintiffs at the time suit was brought supports a realistic belief that a valid claim against Mr. Kaiser exists under Missouri law." Pet. App. 63. If any basis for a constitutional challenge to Missouri law existed (and it does not), it existed at the time the trial court issued its order. Petitioners, therefore, had an obligation to raise their due process claim at the first opportunity after the trial court's order – not for the first time on Motion for Rehearing after opinion by the Missouri Supreme Court. Their failure to do so is a procedural default.

Application of this Court's "fair precision" standard also requires rejection of the Petition for Certiorari. Although it is the statute Petitioners claim creates their purported state-created due process right, Petitioners never mentioned MO. REV. STAT. § 509.290 in any paper filed with any state court. Instead, Petitioners first mention § 509.290 in the Petition for Certiorari. This is too late to warrant this Court's consideration of Petitioners' purported due process claim.

Even when Petitioners raised the federal constitutional claim for the first time on Motion for Rehearing, they failed to cite the statute upon which they now rely. Thus, Petitioners failed to raise the federal constitutional question with fair precision and in due time. The Petition for Certiorari should be denied for this wholly sufficient reason.

III. The Missouri Supreme Court Did Not Disregard the Affidavits in Question and So Did Not Deny Any Due Process Rights of Petitioners.

The Missouri Supreme Court decision does not deny Petitioners the opportunity to present post-petition affidavits nor does it prohibit a court from considering those affidavits. Instead, the Missouri Supreme Court decision merely applies settled law and concludes that Petitioners' affidavits fail to overcome Plaintiffs' adequate showing of counsels' realistic belief of a valid claim at the time of filing the state court action. "The only relevant inquiry is whether the records and pleadings support a realistic belief that there is a claim against Mr. Kaiser." *State ex rel. The Doe Run Resources Corp. v. Neill*, 128 S.W.3d 502, 506 (Mo. 2004) (en banc); Pet. App. 7.

Petitioners acknowledge that where the post-petition affidavits are considered and deemed insufficient to rebut Plaintiffs' venue allegations, due process rights are not denied. Pet. 9, n. 1. That is precisely what happened in this case.

That Petitioners' affidavits did not speak to the critical issue necessary to determine pretensive joinder may be a failure, but it is not a failure of due process for a court to recognize the affidavits' inadequacies. Petitioners' claimed basis for a violation of due process does not exist and the Petition should be rejected.

IV. Mo. Rev. Stat. § 509.290 (2000), the Statute Upon Which the Petitioners Rely to Establish Their Claim That the Supreme Court of Missouri's Decision Violates the Due Process Clause in This Case, Is No Longer the Law of Missouri and Was Not the Law of Missouri at Any Time Relevant to This Cause of Action.

Petitioners assert for the first time in this Court that a specific statute, Mo. Rev. Stat. § 509.290 (2000), provides a state-created due process right to present affidavits in support of a motion for improper venue. Section 509.290 does not provide a basis for this Petition, for at least two reasons. First, § 509.290 applies to motions asserting improper venue, not motions asserting pretensive joinder. Second, § 509.290 no longer states the law of Missouri for purposes of a motion for improper venue.

With exceptions not relevant here, venue in Missouri is generally founded on the residence of the defendant or the place the cause of action accrued. *See* Mo. Rev. Stat. §§ 508.010, et seq. (2000). A motion for improper venue asserts that the case is brought in the wrong venue based

on the venue statutes, that is, that the defendant cannot be sued in that venue. The improper venue motion simply asks the court to apply venue criteria set forth in § 508.010, et seq.

A pretensive joinder motion is an altogether different motion than a motion for improper venue and, for that reason, MO. REV. STAT. § 509.290 does not apply to the pretensive joinder motion filed by Petitioners. The Petitioners' pretensive joinder motion necessarily admits that venue would be proper under § 508.010 against the named defendant in the county in which the case is filed if plaintiffs have stated a cause of action against the defendant. Instead, a pretensive joinder motion addresses the reasonable basis of the factual pleadings in the state court petition as known to the plaintiff at the time the suit was filed.

Petitioners admit that the vitality of the due process claims of the Petition for Certiorari depends on § 509.290 properly stating the law of Missouri. Petitioners' inaccurate "Question Presented for Review" assumes an "independent, state-created right to present such affidavits to challenge the propriety of venue." Pet. i. The Motion for Rehearing filed with the Missouri Supreme Court admits: "Whether due process has been afforded is necessarily determined based on the laws in effect at that [sic] time of the claim." Pet. App. 53-54.

Petitioners' due process claim is without merit as § 509.290 did not state the law of Missouri at any time relevant to the motions below. Where there is no "state-created right" that is the sole legal foundation of Petitioners' due process claim, there is no basis for this Court to grant certiorari.

Under the 1976 amendments to the Judicial Article of the Missouri Constitution, "[t]he supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law." MO. CONST. ART. V, § 5.[3] The Missouri Supreme Court interprets this constitutional provision as follows:

> The Missouri Constitution of 1945 authorized the Supreme Court to "establish rules of practice and procedure for all courts." MO. CONST. ART. V, § 5. In 1976, the citizens of Missouri amended article V so that those rules "shall have the force and effect of law." *Id.* Consequently, rules promulgated pursuant to article V, § 5 "superseded all statutes and existing court rules inconsistent therewith," Rule 41.02; if there is a conflict between this Court's rules and a statute, the rule always prevails if it addresses practice, procedure or pleadings. *Reichart v. Lynch*, 651 S.W.2d 141, 143 (Mo. 1983) (en banc).

State ex rel. Union Electric Co. v. Barnes, 893 S.W.2d 804, 805 (Mo. 1995) (en banc).

MO. R. CIV. P. 51.045 established the specific procedure at the time this action was filed. It makes no provision for the use of affidavits. MO. R. CIV. P. 51.045 controls the procedure for challenging improper venue, not § 509.290.[4]

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[3] The 1976 amendments took effect January 2, 1979. MO. CONST. Art. V, § 27. This case was filed in July, 2001.

[4] Section 509.290 was adopted and last addressed by the Missouri General Assembly in 1943.

Petitioners' Petition for Certiorari relies primarily on two cases for its claim that Missouri law "embod[ies] these Constitutional principles in the context of venue rights." Pet. 6. Both cases, *Glick v. Ballentine Produce, Inc.*, 396 S.W.2d 609 (Mo. 1965), *overruled on other grounds by Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo. 1995) (en banc), and *Lichterman v. Crockett,* 331 S.W.2d 607 (Mo. 1960), predate the 1976 amendments to the Judicial Article of the Missouri Constitution and, for that reason, are no longer credible interpreters of Missouri law on the procedure appropriate for claims of improper venue.

A 1965 case, *Glick* relied on MO. R. CIV. P. 55.31 (1965) (repealed). Then-Rule 55.31(a) exactly mimicked § 509.290.1. After the adoption of the previously discussed constitutional amendments in 1976, the Missouri Supreme Court separated the procedures for motions for improper venue from other motions. As noted, the former were addressed in MO. R. CIV. P. 51.045; the latter in MO. R. CIV. P. 55.27. Both rules repealed § 509.290 because the rules now "have the force and effect of law." MO. CONST. Art. V, § 5. For these reasons, *Glick*, like the Petition for Certiorari, relies on repealed law. It does not support Petitioners' cause.

A 1960 case, *Lichterman* expressly relied on § 509.290 for the proposition that motions asserting improper venue may be supported by affidavit. *Lichterman*, 331 S.W.2d at 609. The *Lichterman* analysis thus relied on the now-repealed statute, not law that applies in this case.

Lichterman is also inapposite for another reason. It relies on now-repealed law that venue in Missouri is also jurisdictional. In 1989, the General Assembly amended the

relevant statute and permitted a summons to issue "from a court in which venue is not proper. Assuming the summons is not itself defective for some other reason, proper service of that summons results in personal jurisdiction over the defendant served." *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820, 822 (Mo. 1994). *De Paul Health* expressly overruled cases holding that venue was jurisdictional. *Id. Lichterman* speaks of venue in its former, jurisdictional manifestation. It no longer accurately states the law on venue matters for this additional reason.

V. The Decision of the Missouri Supreme Court Does Not Conflict With Supreme Court Precedent And Does Not Violate Fundamental Fairness Principles Under the Due Process Clause of the Fourteenth Amendment Because the Supreme Court Has Not Recognized a Due Process Right to Have a Civil Matter Adjudicated in a Specific Venue.

A state's choice of acceptable venues for bringing a civil action against a defendant does not implicate the Due Process Clause of the Fourteenth Amendment.[5] Petitioners admit that they have found "no case from this Court specifically addressing the Due Process issue for defendants in the context of *civil* venue matters." Pet. 15 (emphasis in original). Courts that have addressed the civil

[5] Petitioners' claim that if the Missouri Supreme Court's decision is followed in other states, the decision necessarily threatens due process in "multiple other States" is unfounded. Pet. 14-15. As is obvious, decisions of the Missouri Supreme Court control the law in Missouri only. Moreover, Petitioners have failed to show that the other State statutes are the same as Mo. R. Civ. P. 51.045.

venue issue have determined that while the Constitution imposes constraints on the exercise of personal jurisdiction it does not impose such constraints on the location of permissible venues. *See e.g. FTC v. Jim Walter Corp.*, 651 F.2d 251, 257 (5th Cir. 1981).

This conclusion makes eminent sense. Venue decisions in a civil context do not determine any substantive rights, adjudicate any claims or result in a deprivation of life, property or liberty rights. Nor do such venue decisions threaten a defendant's right to notice and opportunity to be heard in a fair and impartial tribunal. The venue choice serves merely to select the court in which parties exercise due process rights. The venue choice does not determine any issue of substance. Recognizing this legal truth, the Supreme Court of Missouri stated: "While it is possible that Mr. Kaiser may eventually succeed on a motion for summary judgment or at trial, the ultimate substantive merits of plaintiffs' allegations as determined later in the judicial process are not relevant at this stage. The only relevant inquiry is whether the records and pleadings support a realistic belief that there is a claim against Mr. Kaiser." *State ex rel. The Doe Run Resources Corp. v. Neill*, 128 S.W.3d at 506; Pet. App. 7.

This Court has zealously enforced the guarantees of the Due Process Clause so that deprivations of life, liberty or property may not occur absent notice and opportunity to be heard. *See generally, Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and progeny. In none of those cases has civil venue been an issue.

Petitioners' cases are readily distinguishable because they are criminal cases. This Court's Due Process Clause jurisprudence as it relates to venue implicates the right to fair trial in an otherwise proper venue in a criminal

setting, not the state's venue choice itself. *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) (denial of due process exists where change of venue not granted in the face of extensive pre-trial publicity); *Groppi v. Wisconsin*, 400 U.S. 505, 508, 511 (1971) (state's categorical denial of change of venue in misdemeanor cases regardless of publicity violates due process guarantees).

Petitioners have failed to show that any Due Process guarantees are implicated in a state's civil venue selection statutes.

CONCLUSION

For the foregoing reasons, Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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The Honorable Margaret M. Neill

AUGUST 2, 2004

APPENDIX OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN CASE

MO. CONST. ART. V, § 5 provides:

> § 5. Rules of practice and procedure – duty of supreme court – power of legislature. The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended in whole or in part by a law limited to the purpose.

MO. CONST. ART. V, § 27 provides in pertinent part:

> § 27. Except as otherwise provided in this article, the effective date of this article shall be January 2, 1979.
>
> . . .
>
> 20. All laws and rules inconsistent with the provisions of this article shall, on the effective date hereof, be and are repealed. . . .

MO. REV. STAT. § 508.010 (2000) provides in pertinent part:

> Suits instituted by summons shall, except as otherwise provided by law, be brought:
>
> (3) When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides; . . . [.]

MO. REV. STAT. § 509.290 (2000) provides in pertinent part:

> 1. The following objections and other matters may be raised by motion whether or not the same may appear from the pleadings and other papers filed in the cause: . . . (3) Improper venue; . . . 2. The grounds of any of the above may be supplied by affidavit and may be controverted by opposing affidavit. . . .

MO. R. CIV. P. 55.31 (1965) (repealed) provides in pertinent part:

> Matters That May Be Raised by Motion
>
> (a) Matters That May Be Raised. The following objections and other matter may be raised by motion whether or not the same may appear from the pleadings and other paper filed in the cause: . . . (3) Improper venue; . . . (b) Affidavits. The grounds of any of the above may be supplied by affidavit and may be controverted by opposing affidavit. . . .

MO. R. CIV. P. 55.27 (2004) deletes any reference of improper venue and provides in pertinent part:

> Defenses and Objections – How Presented – By Pleading or Motion – Motion for Judgment on the Pleadings
>
> (a) How Presented. Every defense, in law or fact, to a claim in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> (1) Lack of jurisdiction over the subject matter,
>
> (2) Lack of jurisdiction over the person,

(3) That plaintiff does not have legal capacity to sue,

(4) Insufficiency of process,

(5) Insufficiency of service of process,

(6) Failure to state a claim upon which relief can be granted,

(7) Failure to join a party under Rule 52.04,

(8) That plaintiff should furnish security for costs,

(9) That there is another action pending between the same parties for the same cause in this state,

(10) That several claims have been improperly united,

(11) That the counterclaim or cross-claim is one which cannot be properly interposed in this action.

MO.R.CIV. P. 51.045 (effective until July 2004) provides in pertinent part:

Transfer of Venue When Venue Improper

Text of rule effective until July 1, 2004.

(a) An action brought in a court where venue is improper shall be transferred to a court where venue is proper if a motion for such transfer is timely filed. Any motion to transfer venue shall be filed:

(1) Within the time allowed for responding to an adverse party's pleading, or

(2) If no responsive pleading is permitted, within thirty days after service of the last pleading.

If a motion to transfer venue is not timely filed, the issue of improper venue is waived.

(b) Within ten days after the filing of a motion to transfer for improper venue, an opposing party may file a reply denying the allegations in the motion to transfer. If a reply is filed, the court shall determine the issue.

If the issue is determined in favor of the movant or if no reply is filed, a transfer of venue shall be ordered to a court where venue is proper. When a transfer of venue is ordered, the entire civil action shall be transferred unless a separate trial has been ordered. If a separate trial is ordered, only that part of the civil action in which the movant is involved shall be transferred.

(c) A request for transfer of venue under this Rule 51.045 shall not deprive a party of the right to a change of venue under Rule 51.03 if the civil action is transferred to a county having seventy-five thousand or fewer inhabitants. A party seeking a change of venue under Rule 51.03, after transfer of venue pursuant to this Rule 51.045, shall make application therefor within the later of:

(1) The time allowed by Rule 51.03, or

(2) Ten days of being served with notice of the docketing of the civil action ~~in~~ the transferee court as provided by Rule 51.10.